STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE STEP III GRIEVANCE OF ANN GOWEN	)	Case No. 258-2013

* * * * * * * * * * *

HEARING SUMMARY AND NON-BINDING RECOMMENDATION

* * * * * * * * * * *

Hearing Officer Terry Spear, on behalf of the Montana Department of Health and Human Services (DPHHS), held a Non-Union Step III Grievance Hearing on Ann Gowen's grievance of her discharge on September 5-6, 2012. Counsel for the parties submitted their oral arguments at the conclusion of the hearing. Laura Vachowski, Nicole (Nikki) Grossberg, Diane Richard, Chuck Wall, Faith Morken, Arlene Templer, and grievant M. Ann Gowen testified in person. Alice Phelan testified by telephone. All witnesses testified under oath. Exhibits JT-1 through JT-32 (including Exhibit JT-3a) and Exhibits 33 and 34 were admitted into evidence.

The Hearing Officer recommends the following resolution of this grievance, based upon the facts found herein, for the reasons stated herein.

1. Facts Found and Discussion

The DPHHS Child and Family Services Division (CFSD) employed M. Ann Gowen, beginning in 1985, until her disciplinary discharge on May 24, 2012. Gowen filed a grievance regarding her discharge, and the hearing summarized herein resulted at Step III of that non-union grievance.

Gowen served as a Child Protection Specialist Supervisor from 1992 until her discharge, in the Polson, Montana, CFSD office. The Polson office is in CFSD Region V. Over the years, a number of Region V Administrators supervised Gowen, including Arthur Dreiling, Coral Beck, and Nikki Grossberg.

As a Child Protection Specialist Supervisor, Gowen was responsible for ensuring that each subordinate Child Protection Specialist conducted and documented investigations in accordance with statutes, regulations, and DPHHS policies, including preserving the confidentiality of the investigation and its documentation. In her supervisor position, Gowen was also responsible for the preservation of confidentiality and for providing information, as required by her supervisors, about the work and the whereabouts of her subordinates, as well as following the directions of her own supervisors regarding all of her duties. Although Gowen had considerable discretion in carrying out her duties, she was expected to

exercise that discretion in conformity with DPHHS policies and in conformity with the directions of her supervisors.

At various times, the Polson office was short-staffed. Due to budget constraints, this was common for CFSD offices across the state.

A. Gowen's Discharge

DPHHS gave Gowen notice, by a letter from her supervisor, Nikki Grossberg, dated April 12, 2012, that effective immediately Gowen was being placed on paid investigative leave pending an investigation of her apparent breach of confidentiality as a Child Protective Specialist Supervisor. Exhibit JT-20.

As of April 12, 2012, Gowen had been disciplined several times. Her then supervisor, Coral Beck, gave Gowen a written warning, dated May 17, 2010, about a number of performance deficiencies, making a formal request that the Lake County (Polson) office meet certain expectations (set forth in 14 numbered paragraphs), and specifically informing Gowen, that, as the supervisor of that office, she would be responsible for "follow-through on these concerns." Exhibit JT-4. Beck suspended Gowen without pay for two days, by a letter dated January 3, 2011, because Gowen had breached confidentiality by accessing a secure report that had not been assigned to her regarding an investigation of alleged abuse/neglect of a child of one of the Child Protection Specialists she supervised. Exhibit JT-7. Beck next suspended Gowen without pay for five days, by a letter dated April 11, 2011, because of her continued failure to meet the performance requirements of her position. Exhibit JT-15. The record in this hearing indicates that there were no pending proceedings involving any of those prior disciplinary actions on April 12, 2012.

For each of the prior disciplinary actions, DPHHS had first provided Gowen with a written notice that it was considering taking disciplinary action against her, and accorded her a chance to respond in writing to the specifics of the basis for disciplinary action in that particular instance. The written notices and all of Gowen's responses leading up to each of the prior disciplinary actions are part of the record of this hearing. Before any of these disciplinary actions, Beck had given Gowen a letter dated January 29, 2009, listing performance expectations for the Polson office that Gowen, as the supervisor in that office, was responsible for assuring the office met. Exhibit 33. Some years before then, her supervisor, Arthur Dreiling, had given Gowen a letter dated November 13, 2006, with directions regarding some practices he required that Gowen follow in the office. Exhibit 34.

By a letter dated April 27, 2012, Grossberg gave Gowen notice that she was considering discharging Gowen for inappropriately disseminating confidential information, in violation of the employer's policies. Exhibit JT-21. The specifics of

the alleged inappropriate dissemination involved a meeting, which according to Gowen's response (Exhibit JT-22) to Grossberg's letter occurred in late March 2012, Gowen had met with Chuck Wall, a non-DPHHS attorney, and Diane Richard, a CASA (Court Appointed Special Advocates) of Montana director at that time, to discuss the restructuring of CFSD services for Lake County. During that meeting, Gowen disclosed multiple child protection reports, names and dates, and shared reports labeled "secure" with Wall and Richard, including a report that revealed the name of a current or former CASA representative who worked or had worked with Richard or under Richard's supervision. Exhibit JT-21.

Grossberg's letter, like the previous notices that the previous disciplinary actions were being considered, gave Gowen an opportunity to submit a written response, which she did submit on May 4, 2012. Exhibit JT-22. Gowen remained on paid administrative leave while the process continued.

In her response, Gowen denied that she had breached confidentiality. She asserted that when, on April 10, 2012, she had told Grossberg about the information and reports she had shared with Wall and Richard, Grossberg had immediately responded that Gowen had breached confidentiality. According to Gowen's response, she had argued with Grossberg that Wall and Richard were allowed to have the information as "partners in CPT [Child Protective Team]." Gowen asserted that in her argument with Grossberg on April 10, 2012, she told Grossberg that Richard had previously received the same information at a CPT meeting which Grossberg had attended on March 13, 2012, and at which Grossberg herself had required sharing the complete list of cases referred to CPT, which meant CPT members (including Richard) saw all of the same information that Gowen showed Wall and Richard in the meeting (outside of DPHHS's premises) she had with them in late March 2012. Gowen's response included her statement that she didn't "understand how it is not a breach of confidentiality when you show those lists to the CPT and it is a firing offense when I do." Exhibit JT-22, p. 4.

In her response, Gowen also alleged that all efforts to terminate her were triggered by a single action on her part:

> [T]hese attempts to terminate me began and continue to be motivated by the reporting of a security breach by [name] in December, 2010. [sic] (an enrolled member from Anna Whiting Sorrell's tribe – CSKT) Prior [sic] to that I had 26 years of faithful performance without a single disciplinary action in my personnel file.

Exhibit JT-22.

Gowen concluded her response by making bold assertions about the motivation for the disciplinary actions against her:

> I had no idea that reporting [name]'s undisputed breach of our secure computer system would result in such an onslaught of retaliation from our director. It is shameful that such a blatantly racial retaliation can occur with the support of the Agency Director.[1]

Exhibit JT-22.

Gowen continued on paid administrative leave while the process continued, until she received a letter dated May 24, 2012, by which Grossberg notified her that her employment with DPHHS was terminated, effective immediately, because of "continuing failure to meet the performance requirements of [Gowen's] position." Exhibit JT-23. The letter specified that Gowen's final failure to meet the performance requirements of her position occurred when she disclosed confidential information to Wall and Richard, as described in the April 27, 2012 letter. Exhibit JT-21.

Gowen submitted a formal grievance, signed on June 7, 2012, regarding her termination. Exhibit JT-24. Her specific statement of the violation she was grieving was as follows:

> I was terminated without due process of law for allegedly violating confidentiality which I deny. The applicable law is M.C.A. §41-3-108 and DPHHS policies 104-1 and 502-3. The termination was part of an on-going conspiracy involving Anna Sorell [sic], Cory Costello, Nicole Grossberg, and Coral Beck. See attached narrative.

Exhibit JT-24.

Gowen's attached 4-page narrative incorporated her "previous responses to this continuing effort to deprive me of my rights, including my responses to due process letters" dated December 14, 2010 [Exhibit JT-6]; January 20, 2011 [Exhibit JT-8]; February 16, 2011 [Exhibit JT-10]; March 14, 2011 [Exhibit JT-12]; March 31, 2011

---

[1] The "reporting of a security breach," which Gowen asserted was the real and sole cause of the "conspiracy" to wrongfully terminate her employment and she asserted had been going on for 16 months as of her April 2012 response, appears within Exhibit JT-27. This email from Gowen, sent on December 16, 2010 to seven recipients, with a subject of "Security and the Flathead Tribe with CAPs" has its headings at the bottom of the first page of Exhibit JT-27, and its substance appears on the second page of the same exhibit.

[Exhibit JT-14]; April 26, 2011 [Exhibit JT-16]; and May 4, 2012 [Exhibit JT-22]. Following this list, she concluded her 4-page narrative with the assertion that:

> The above responses were submitted in timely fashion in reference to this on-going conspiracy to deprive me of my employment and are incorporated therein by reference.

Exhibit JT-24.

Because Gowen's grievance asserted an overarching conspiracy, commenced in December 2010 and continuing through all following disciplinary actions including her termination, further discussion of her discharge will be deferred until after review of the evidence regarding prior discipline, in Section B of this recommendation. Thereafter, in Section C, consideration of her discharge grievance will resume.

B. Communications with Gowen about Performance Problems and Progressive Discipline Before Her Discharge: (1) Communications and Progressive Discipline Before Gowen's "Reporting of a Security Breach" on December 16, 2010

By a letter dated November 13, 2006, Gowen's then supervisor, Arthur Dreiling, made an express effort "to ensure daily supervisory presence and oversight in [Gowen's] Office." Exhibit 34. Dreiling required Gowen to be in her office, so that he could verify her presence, on Wednesdays, 11:00 a.m. to 4:00 p.m., and on Thursdays and Fridays, 8:00 a.m. to 5:00 p.m., unless she obtained his written or oral permission to deviate from that schedule. He also directed her to initiate a similar schedule for the employees she supervised, and to initiate the use of the "in-out calendar" in Outlook to track her presence and the presence of her staff.

These directives were not disciplinary – no "warning" or "expectation" language was included. On the other hand, it is more likely than not that Dreiling sent the letter because of problems with Gowen's daily supervisory presence, her staff's presence and availability, the ability of Dreiling to find Gowen and/or her staff, and the ability of Dreiling to verify whether Gowen and/or her staff were in the office. Obviously, this letter was not motivated by "racial retaliation" due to a gratuitous report by Gowen of a "security breach" about which she had only hearsay knowledge, which would not occur until more than five years after this letter was written. Exhibit 34.

By a letter dated January 29, 2009, Gowen's then supervisor, Coral Beck, made a formal request that the 14 numbered expectations listed therein be followed by the Polson (Lake County) office. Beck added that Gowen, as supervisor of that office, was responsible for follow-through on "these concerns." Included in those expectations or concerns were (No. 1) adequate coverage of the office during operating hours, with staff present in the office during the receptionist's lunch break;

(No. 2) reports investigated, Investigative Safety Assessments (ISAs) completed and closed on the secure computer system (CAPS) within times set by policy, and a backlog of ISAs reviewed and uploaded by Gowen within (essentially) two weeks; and finally, the Polson office must follow practice and policy as outlined and as followed by the rest of the state. Exhibit 33.

During her Step III Grievance Hearing, Gowen asserted that she had requested the January 29, 2009 "expectations" letter. Whether or not she requested it, it was, like the Dreiling letter before it, a clear statement by Gowen's supervisor of aspects of job performance that Gowen had to improve. Again, this letter could not have been motivated by "racial retaliation" due to a gratuitous report by Gowen of a "security breach" about which she had only hearsay knowledge, which would not occur until almost two years after this letter was written. Exhibit 33.

By a letter to Gowen dated March 12, 2010, Beck gave notice that she was considering taking formal disciplinary against Gowen for "continued failure to meet the performance requirements of your position, including your failure to carry out your supervisory responsibilities." Exhibit JT-1. Beck also stated in her letter that she had repeatedly counseled Gowen about her failures to meet her performance requirements, in "scheduled phone calls and numerous conversations in person." She specifically cited the January 29, 2009 letter as counseling Gowen about her failure "to carry out your supervisory responsibilities, including your failure to communicate effectively with your staff, your failure to address performance issues with your staff, and your failure to ensure that your staff was properly responding to reports of child abuse and/or neglect." Exhibit JT-1, first page.

At the bottom of the first page, and continuing through the second page to the beginning of the third page of Exhibit JT-1, Beck cited multiple specific concerns about Gowen's performance, in five bullet points.

First, she cited Gowen's continued direct communications with a defense attorney about a conditional relinquishment of parental rights regarding one child (after direction from Beck advised that a conditional relinquishment would not be acceptable), as well as other direct communications with defense attorneys in other cases despite ongoing concerns about such contacts.

In the next two bullet points, Beck expressed ongoing concerns about Gowen's "understanding and follow through with basic practices necessary in your role as supervisor."

In the second bullet point, Beck cited a case involving a child who was twice hospitalized, first for cracked ribs in October 2008 and then a broken femur in December 2008. A care-giver outside of the family (a babysitter) admitted breaking

the child's leg and was being prosecuted, but (according to Beck) there was also a "high likelihood" that the babysitter, who was responsible for the child's care in October, was also responsible for the earlier injury, and there was no referral to law enforcement for that incident. Beck also asserted that when she reviewed the completed ISAs for both reports in January 2010, there was very little documentation considering the level of injuries, and no referral to law enforcement by CFSD with no consideration of the babysitter as the possible perpetrator of the October injuries.

In her third bullet point, Beck asserted that in January 2010, she had reviewed 162 reports dated from December 16, 2008 through November 24, 2009, and had significant concerns regarding supervisory review of ISAs. She noted specific concerns with over half of the reports.

In her last two bullet points, Beck cited concerns from the January 29, 2009 letter that remained issues.

In her fourth bullet point, Beck reiterated that the state car needed to be utilized for employee travel, and stated that employees could not combine vacation or personal travel with expenses claimed to visit a child in another community, thereby claiming reimbursement for expenses they would have incurred for the personal or vacation travel even if they had not visited the child (although they could claim the time spent with the child).

In her fifth bullet point, Beck reiterated Gowen's work hours and emphasized again that Gowen's physical presence in the office, unless she notified Beck of her absence, was required and that Gowen's staff needed to notify Gowen at the beginning of the day about their absences and document those absences in the Outlook calendar.

Beck concluded her letter by stating an overall expectation that the Polson office and Gowen follow practice and procedure the same as CFSD employees across the rest of the state. She concluded the letter by setting a deadline for Gowen to respond in writing before any final decision regarding disciplinary action was made. This due process letter also could not have been motivated by "racial retaliation" due to a gratuitous report by Gowen of a "security breach" about which she had only hearsay knowledge, which would not occur until more than nine months after this letter was written. Exhibit JT-1.

By a 9-page undated letter (Exhibit JT-2), Gowen responded to Beck, denying that she had known Beck was counseling her, instead alleging that she believed the meetings at which items requiring improvement were discussed were "case staffing meetings." Gowen also denied that Beck had given her any specific directives, either

verbally or in writing, "regarding anything that required immediate attention or needed immediate change" (emphasis added). Exhibit JT-2.

After denying that she had been informed of any current problems requiring correction, Gowen went on, at length, to deny that there were any current problems. She stated generally that, "I do not believe I am failing to fulfill my assigned duties." She discussed how she had continued direct communications with defense attorneys about a conditional relinquishment of parental rights regarding one or more children, citing lack of responses from the involved lawyers in the County Attorney's office, and asserting that she had never agreed to or encouraged any resolution involving conditional relinquishment of parental rights but had only discussed such conditional relinquishment as unacceptable. She denied acting without the support and assistance of the attorneys in the County Attorney's office in all cases except the conditional relinquishment cases. She admitted that she "sent ISA's that didn't adequately outline what had happened" in the case where a care-giver outside of the family admitted injuring the child, in at least one of two separate incidents, but asserted that making a referral to law enforcement "would not have insured a prompt or accurate response." Exhibit JT-2.

This last statement, in particular, appears to say that failure to make the referral did leave the infant at risk, but the infant might still have been at risk even with the referral. This would be a shocking statement for a CFSD Child Protection Specialist to make, let alone a CFSD Child Protection Specialist Supervisor, regarding a failure to make a referral to law enforcement. Minimizing failure to make such a referral on the grounds that it might not have protected the child seems to say that not doing everything possible to protect a child is excusable when doing everything possible would not have guaranteed that child's safety anyway.

Gowen blamed a former half-time supervisor for the late and deficient ISAs and asserted that after another worker was assigned to help catch up the reports, that Gowen herself then "had the rest caught up by February 14, 2008 per your request." Exhibit JT-2. Reports "caught up by February 14, 2008" clearly were not reports dated between December 2008 through November 2009, so this response did not address any part of the time period covered by Beck's review.

Gowen also asserted that to her knowledge no CFSD supervisor had ever been disciplined for substandard work by that supervisor's investigators. Although Gowen denied that she was doing anything wrong at all, she expressed willingness to learn and "to reinforce strengths and solve problems in the office." Exhibit JT-2.

The overall tone of Gowen's response to the March 12, 2010 letter was that she was surprised to be warned about possible disciplinary action against her when she was not in any respect deficient in her job performance, although she conceded

that there were "areas that need improvement" in the office that she supervised. She specifically asked Beck to "[p]lease let me know what I need to do after you receive this letter. I am open to any suggestions that you have or tasks you want me to complete." She denied that Beck had given her any "specific" work to do on organizational skills, but stated that she was "always willing to learn anything I can." She closed by asking that Beck "let me know when you have received and read my letter" and stated "I would like to discuss your letter and my response as soon as possible." Exhibit JT-2.

DPHHS had a standard process of formal and progressive discipline. Before the process begins, normal interactions between the employee and the supervisor could include spoken suggestions and directions by the supervisor for the employee to improve performance. If the problems in performance persisted, counseling or "coaching" (still spoken) about the problems might begin to occur, and the supervisor would eventually begin to make notes of when such counseling occurred with the employee about persistent or serious problems. If the problems were not resolved, the supervisor might next present the employee with a letter stating performance expectations of that employee, which would not be a written performance warning, but would document a formal notice of continuing performance problems.

If the problems still persist, a written notice of consideration of formal discipline might then be given to the employee (a so-called "due process" letter), indicating that the supervisor was now considering taking formal disciplinary action. Before formal disciplinary action would be taken, the due process letter would give the employee a deadline for submitting a written response to the supervisor addressing the problems stated in the due process letter. At that point in the process, the normal interactions between the supervisor and the employee would ordinarily continue, with regard to ongoing work, but those interactions would no longer be an appropriate method of resolving the matters set forth in the due process letter, for which a complete record was now being established through the written exchanges.

With more than 25 years of employment with DPHHS, the last 17 years of which had been as a supervisor, Gowen knew or reasonably should have known that Beck was not going to participate in an informal discussion about the pending due process letter. Nonetheless, Gowen solicited such a discussion, requesting a discussion with Beck about the due process letter and her response to it "as soon as possible."

By a letter dated April 27, 2010, Beck provided Gowen with more information about the ISA reports, asking that Gowen respond by April 30, 2010. Exhibit JT-3.

Gowen did not respond by April 30, 2010. By a letter dated May 17, 2010 (a handwritten change from the original date of May 7, 2010), Beck gave Gowen a

written warning, discussing Gowen's initial response, replying to that response, and identifying Beck's specific expectations for Gowen's improved performance. Gowen signed for receipt of this letter on May 19, 2010. This was formal written discipline, which could not have been motivated by "racial retaliation" due to a gratuitous report by Gowen of a "security breach" about which she had only hearsay knowledge, which would not occur until almost eight months after this letter was written. Exhibit JT-4.

Gowen responded to Beck's April 27, 2010 letter with an updated status report on the various ISAs. Gowen's response bears two "sent" dates – May 14 and May 19, 2010. Exhibit JT-3A. This supplementary response to Beck indicated that Gowen still believed that nothing in Beck's litany of problems justified discipline and that any minor problems that actually existed had now been explained away and/or fixed. The content of this letter suggests that it was sent before Gowen had received the written warning (dated May 17, 2010). It certainly could have been sent after Gowen received the written warning. The written warning's content suggests that Beck had not seen Exhibit JT-3A before she delivered the written warning (Exhibit JT-4) to Gowen.

None of the written requests for improved performance by Gowen to this point had born any monetary consequences for her. The 2010 written warning letter, the 2009 performance expectation letter, and the 2006 required practices letter could all three be fairly described as attempts to improve Gowen's performance, without imposition of any concrete penalty. However, the May 17, 2010 written warning from Beck clearly was formal disciplinary action. On the third and last page of that written warning (Exhibit JT-4), Beck stated, "If you fail to meet the expectations identified above, you will be subject to additional disciplinary action, up to and including termination." Emphasis added. This language, following the notice in the March 12, 2010 letter that Beck was considering formal disciplinary action, made it abundantly clear to Gowen that she had been disciplined.

By May 17, 2010, seven months before Gowen's "reporting of a security breach" by a person who was a member of the same Native American Tribe as the DPHHS Director, DPHHS had already given Gowen multiple warnings of performance problems, a notice that formal discipline was being considered, and the May 17, 2010 formal disciplinary warning letter.

By a letter dated December 7, 2010, Beck gave Gowen notice that Beck was again considering taking formal disciplinary action against Gowen for an "apparent breach of confidentiality." The letter recited that Gowen, on October 9, 2010, accessed a secure report involving an investigation of a report of neglect or abuse involving a parent who worked under Gowen's supervision in the Polson CFSD

office. The letter stated that Gowen knew on October 8, 2010 that the report would be made on the employee, but despite talking with Beck that day had not mentioned and discussed the impending report during the telephone conversation. The letter stated that the secured report had been assigned to Beck, that Gowen had left Beck a phone message on Saturday, October 9, 2010, that she had accessed the report, and that in a discussion with Beck on November 12, 2010 about the situation, Gowen had said she had looked at the report because she "wanted to know if there was anything significant in the report and . . . wanted to know the allegations." Beck provided copies of the confidentiality policies she cited as violated by Gowen's accessing of the secure report. Beck once again asked Gowen for a written explanation (by December 15, 2010) before making a decision about discipline. Beck signed the letter on December 7, 2010, acknowledging receipt and acknowledging the deadline for a written explanation. Exhibit JT-5.

This letter, like those before it, could not have been motivated by "racial retaliation" due to a gratuitous report by Gowen of a "security breach" about which she had only hearsay knowledge. Gowen's report did not occur until nine days after this letter was delivered to her. Exhibit JT-5. Nonetheless, Gowen included this letter in her formal grievance of her termination, at least suggesting that it somehow was prompted by the hostility she alleged DPHHS suddenly evidenced after her gratuitous report of a "security breach" about which she had only hearsay knowledge.

Gowen's written response, dated December 14, 2010, detailed the events involved in the originating report of neglect or abuse (discussing the persons involved in the incident by their names). Gowen stated that she "did not believe there was an intentional breach of confidentiality." She noted that she had been with the employee involved, traveling to visit a child on a CPS investigation, when the employee was contacted by phone about her child, and that the employee had recounted to Gowen what was happening as it was happening.

Gowen went on to assert that she was authorized to find the report on the computer system at the office on Saturday, October 9, 2010, and to look at it, because as the employee's supervisor, Gowen had a "need to know" whether the employee would be placed on mandatory leave. Gowen's "need to know" arose from her need to plan for coverage of investigative work the employee would be unable to do during any mandatory leave. Gowen asserted that she had not "heard from" Beck about the matter over the weekend of October 9-10, 2010. Exhibit JT-6 [persons' names redacted].

There is a significant problem with Gowen's explanation. From the testimony at hearing, as well as the documents, Gowen, knowing the persons involved in the incident with her worker's child, was reasonably certain on October 8, 2010 that the

report of possible abuse or neglect would be filed. From all of the evidence presented, it is more likely than not that Gowen was also reasonably certain that the filing of the report would trigger a mandatory leave for her worker. Thus, on this record, it seems clear that Gowen did not have a "need to know" that justified accessing the report that weekend, even if (as she appears to assert) she was justified in waiting for a short time (Friday evening and Saturday morning, until she went ahead and accessed the report), because Beck should have contacted her that weekend and answered any questions she had about mandatory leave for her worker.

B. Communications with Gowen about Performance Problems and Progressive Discipline Before Her Discharge: (2) Gowen's "Reporting of a Security Breach" on December 16, 2010

Two days after Gowen submitted her response to Beck's December 7, 2010 notice of consideration of taking formal disciplinary action against Gowen for accessing a secure report that she had no authority to access, Gowen sent an email, through her DPHHS state email account, addressed to seven people: three different DPHHS CAPS technical support employees, to Beck, to Beck's supervisor, Field Services Administrator Cory Costello, to Cathy Spencer, another member of DPHHS management whose exact position at the time is not part of the record, and to the Flathead Tribal Social Services Administrator. Gowen reported that the Tribal Social Services Administrator had told her that the events reported by the email had happened. All seven recipients could see the names of all recipients. Exhibit JT-27.

Taking as true the contents of the email, for purposes of analysis, the Tribal Social Services Administrator told Gowen that the administrator, who had access to CAPS, had tried to log in and had not been able to access CAPS. The administrator said that she had called CAPS technical support ("the help desk") and had been told that she could not access CAPS because technical support had a request with her name signed on it to take her off the system. The administrator told Gowen that she had obtained a copy of that signed request, and it was not her signature. The administrator said that the Tribal Social Services Supervisor (who was going to replace the administrator as the Tribal Social Services worker with access to CAPS after a transition that had not yet been completed) had forged the administrator's name on the request. The administrator also told Gowen that "the help desk" thought this might be a breach of state security.

DPHHS policy regarding "Internet, Intranet & E-Mail Acceptable Use" (Exhibit JT-26) included a single sentence stating "Users will report unacceptable use and other security violations to their immediate supervisor, the DPHHS Security Officer or the Human Resources Office."

Gowen, with all of her years of experience with DPHHS, could have suggested to the administrator that she pursue the matter with DPHHS's information technology people, who apparently were already aware of it. Gowen herself had no first-hand knowledge of what had happened, and may not even have had an obligation to report her second and third-hand knowledge to anyone. Gowen apparently did not make that suggestion or, if she did, did not stop with making that suggestion. Gowen also could have called her supervisor, Beck, and repeated what she had heard. Doing so would definitely have satisfied any reporting obligation Gowen could possibly have had. She did not. Gowen could also have made a phone call to advise one person in Human Resources, or one person in technical support, of what she had heard, and thereby have satisfied any reporting requirement she might have actually had. She did not. If she felt the need to have documentation that she had reported her second and third-hand information to protect herself from any claim that she should have reported what she had heard, she could have sent an email about it to one of the appropriate persons identified in the policy. Instead, on December 16, 2010, she sent the following email to six people in DPHHS and the Tribal Social Services Administrator:

> I was told by [name of the Flathead Tribal Social Services Administrator] that she had been taken off the CAPs system because [name of the Flathead Tribal Social Services Supervisor] forged her name on the request to have her taken off. [Administrator's name] said she called the help desk because she could not enter the system and they told her why she couldn't enter and they sent her the document with her name forged. She said that the help desk thought this might be a breach of state security.
>
> [Administrator's name] has been the head of Tribal Social Services. They are currently in a transition and the program will not be under her department. The transition hasn't occurred yet. [Supervisor's name] is the supervisor for Tribal Social Services, but she continues to be under [Administrator's name]'s supervision until the transition occurs.
>
> I'm not sure what to do with this except to inform you. Ann Gowen

Exhibit JT-27.

From this point Gowen can assert, consistent with reality in terms of chronology, that all disciplinary action after she reported the "security breach" was

"blatantly racial retaliation." Exhibit JT-22. No event before December 16, 2010 could possibly have been prompted by the email of December 16, 2010.

Gowen's email report was gratuitous because she probably did not need to make a report at all, and had multiple options to make a report, if she nonetheless felt the need, without creating problems for her employer. Her characterization of the incident as a "security beach" is dubious. She attributed this characterization to the "help desk," but on its face, the incident resulted in lockout of an authorized user, rather than access to CAPS for an unauthorized user. Gowen's only knowledge of the incident came from what other people said to her, and thus was entirely hearsay. For these reasons, Gowen's conduct on December 16, 2010 can fairly be described as a gratuitous report of a "security breach" about which Gowen had only hearsay knowledge.

B. Communications with Gowen about Performance Problems and Progressive Discipline Before Her Discharge: (3) Communications and Progressive Discipline After Gowen's "Reporting of a Security Breach" on December 16, 2010

Gowen repeatedly asserted, before and during this grievance hearing, that her discharge was the result of a conspiracy between members of management, from her immediate supervisors Beck and then Grossberg up through the chain of command to and including the Director of DPHHS. In short, in addition to her assertions that she never did anything wrong at all, Gowen also asserted that once she sent the December 16, 2010 email, this conspiracy came into existence, set in motion by the fact that the Tribal Social Services Supervisor about whom she gratuitously reported second-hand information belonged to the same Tribe as the DPHHS Director. This assertion is tantamount to an admission that Gowen's email was or could have been damaging to that Supervisor.

Gowen cannot establish her claim of "racial retaliation" unless, at the very least, she has some evidence that she was unfairly subjected to discipline thereafter at least in part because of her email. Otherwise, all she has is the timing – that DPHHS's disciplinary action against her after December 16, 2010 came after her email.

There is a Latin phrase used to describe assertions that an event that happened first caused events that happened afterwards. The phrase is "post hoc ergo propter hoc," which means "after this, therefore because of this." Such an assertion is based on a classic logical fallacy, which confuses timing with causality. Event A came before Event B, therefore Event A must have caused Event B. Timing alone cannot prove causality. The timing of events can be pure coincidence, or the result of some other causal factor or factors than the first event. No one would suggest that because

the sun comes up after the rooster crows, the rooster crowing causes the sun to rise. Relying solely upon sequence to decide causation is a faulty method of reasoning.

There was one immediate consequence of Gowen's December 16, 2010 email. One hour and six minutes after Gowen sent the email, Costello responded.

> Ann,
>
> Given the highly inflammatory nature of this situation and the fact that you have no reason to be involved, sending this information out was highly inappropriate. Effective immediately, I would expect that you will use more discretion and professional judgment AND prior to involving yourself or acting on information that does not involve you, you would speak with your supervisor. Additionally, I will be discussing this with Coral more thoroughly.
>
> Furthermore, do not contact anyone about this situation. Coral will be handling the clean up on this!
>
> Cory

Exhibit JT-27.

Costello's email clearly indicated that there might be consequences for Gowen's email ("Additionally, I will be discussing this with Coral more thoroughly"). The questions that arise for purposes of this grievance are whether Gowen's email did trigger, in whole or in part, other subsequent DPHHS disciplinary actions, and if so, which actions and whether there was anything improper about any such actions. Given the recent history of problems that DPHHS was having with Gowen, there is no basis to presume that any or every disciplinary action after her email was a result of her email.

In terms of what DPHHS found it necessary to do to remedy the impact of Gowen's email, on December 20, 2010, Coral Beck sent a letter to the Flathead Tribal Social Services Supervisor, on DPHHS letterhead, regarding Gowen's December 16, 2010 email, which read:

> Dear [Tribal Social Services Supervisor's First Name]:
>
> CFSD would like to clarify that personal statements made by a CFSD staff with regard to the CAPS access issue do not reflect the opinion of the agency. CFSD or representatives of CFSD do not have a role in administrative duties of the tribes or the transition of administrative duties from [Tribal Social Services

> Administrator's Name] to you, [Supervisor's Name]. CFSD as an agency supports the decisions made by the tribal council. We in every effort will provide whatever assistance is requested to assist in the provision of services to children and families served by Consolidated Salish and Kootenai Tribes, Social Services Division.
>
> Please feel free to contact me should there be a need for anything further,
>
> Respectfully,
>
> Coral Beck.

Exhibit JT-27.

The next disciplinary action against Gowen was Beck's January 3, 2011 letter suspending Gowen without pay for two days for accessing a secured report that had not been assigned to her. Exhibit JT-7. This disciplinary suspension followed the December 7, 2010 due process letter (Exhibit JT-5) and Gowen's December 14, 2010 response to that letter (Exhibit JT-6).

Beck stated that Gowen had violated DPHHS Human Resource Policy #200. She noted that in her December 14, 2010 response, Gowen had asserted that she had accessed the report because of her concerns regarding staffing in the event the employee would be placed on administrative leave. Beck replied that Gowen should have spoken to Beck, who could have assisted her without the need for a breach of confidentiality, concluding, "[i]n short, nothing in your report justifies your unauthorized access of the report." Beck also noted:

> The Department takes confidentiality very seriously. I expect there will be no further breaches of confidentiality. Any further breaches of confidentiality by you may result in further disciplinary action, up to and including the termination of your employment with this agency.

Exhibit JT-7.

Beck's disciplinary letter of January 3, 2011 followed DPHHS's standard practice of stating that the disciplined employee's response (Exhibit JT-6) to the due process letter notice letter was attached. Human Resources consultant Laura Vachowski removed the response, because it disclosed the names of the persons involved and the particulars of the incident that led to the generation of the secured report. Vachowski attached instead her memo that because of the disclosures therein Gowen's response would not be attached. Exhibit JT-7.

On the record, there is no credible evidence that Gowen's December 16, 2010 email had anything to do this with disciplinary action. Gowen's unnecessary accessing of the secure report was a reasonable and sufficient basis for the 2-day suspension, given prior discipline of Gowen, DPHHS's progressive discipline policies, and the gravity of a breach of confidentiality by a senior supervisor.

By a memo dated January 20, 2011, Gowen invoked Step II of the grievance procedure and submitted a formal grievance after being unable to resolve the grievance (Gowen's insistence that she had not violated confidentiality and had a "need to know" the content of the secured report) informally with Beck. The heart of the formal grievance remained Gowen's "need to know" argument, but it was six pages long, with multiple arguments and requests. Exhibit JT-8.

As already noted, Gowen's "need to know" argument was flawed and without substance. One of her further arguments in JT-8 actually supported the disciplinary concerns of DPHHS. She asserted that she "did not intend" and did not "believe that" she had done any harm by accessing the secure report regarding her worker. Breach of confidentiality is per se harmful, because of the very nature of CFSD's work. It is not possible for a beach of confidentiality to be harmless, because without complete confidentiality, CFSD violates its statutory obligations, and may have more difficulty getting the information it needs to do its work.

For a supervisor with decades of years of experience in this very work to present a "no harm, no foul" argument about unauthorized accessing of a secure report suggests a superficial grasp of the nature of the very work that Gowen both supervised and herself performed. That she may already have learned about the incident from the involved parent, and thus might not have learned anything new from the report, does not in the least make it acceptable, or even merely trivial (a purely technical violation), for her to access the secured report. First, even if Gowen learned nothing new about the incident itself from accessing the report, accessing a report the contents of which she had no "need to know" to do her work was a direct violation of policy. Second, since Gowen only knew what her employee had reported about the incident, Gowen certainly could learn, and perhaps did learn information about the incident, about how others saw or reported about it, about how it was documented, etc., that she could not have learned from what the employee told her during their work-related trip on October 8, 2010.

Another of Gowen's additional arguments in Exhibit JT-8 appears to be that DPHHS had not sufficiently trained her to appreciate the seriousness of her breach of confidentiality. This argument effectively admits that she knew accessing the report was a breach of confidentiality, but thought it would not amount to much ("I did not expect such a harsh response to my action"). This also is a remarkable

statement for a very experienced supervisor to make about her own lack of understanding of confidentiality.

Taken together, her statements resemble legal pleadings in the alternative. First, she didn't breach confidentiality, and second, if she did, it wasn't her fault because someone should have trained her to better understand confidentiality. Refusal to take responsibility for her own choices and actions when faced with discipline is itself legitimate cause for DPHHS to have concerns about her ability to perform her job duties.

Gowen concluded her formal grievance, with two more arguments – one that punishment is not corrective action and the other that a standard suspension penalizes with greater or lesser severity according to rate of pay. Exhibit JT-8. The former argument seems to suggest that Gowen believed that because DPHHS called its discipline "corrective action" it had no right to take any actual disciplinary action, another surprising statement from a very experienced supervisor who had to be familiar with DPHHS's progressive disciplinary policy and practices. The latter argument ignored the fact that a standard 2-day suspension would cost every suspended worker the earned value of the same amount of work, which could be considered precisely mathematically equal across the board.

By a letter dated January 27, 2011, Beck denied Gowen's grievance at Step II. She cited the policies that prohibited breach of confidentiality and prohibited employees from looking up information on persons in CAPS without a work-related "need to know" the contents of the report. She further explained that Gowen should have called her to ask about whether the employee involved would be placed on leave, and added that a phone message had been left on Friday afternoon for Gowen to contact Beck, and that contacting Beck would have obviated the alleged need to access the secured report. Beck also stated that the "decision that you had violated confidentiality warranting a 2-day suspension was made in accordance with the Department's standard review and consultation practice." Beck also stated that the suspension letter would remain in Gowen's personnel file "until further notice." Exhibit JT-9.

By a memo dated February 16, 2011, Gowen invoked Step III (Department Head review) of the grievance process regarding her 2-day suspension without pay for breach of confidentiality. Gowen's arguments remained essentially the same as at the first two steps, with the exception that she added an argument that a suspension of less than a week for an exempt employee was improper, stating that "suspending me

for two days without pay indicates that I am not considered an 'exempt employee' which could make me eligible for back overtime pay."[2] Exhibit JT-10.

Before any response to Gowen's Step III grievance memo was forthcoming from the Department Head or her designee, Beck, by a letter dated March 1, 2011, gave Gowen notice that Beck was again considering taking formal disciplinary action against Gowen for "continued failure to meet the performance requirements" of Gowen's position.

This new due process letter began with a recitation of Gowen's prior discipline – the January 3, 2011 2-day suspension (still in Step III appeal review) and the May 17, 2010 written warning. The letter also listed eleven dates in November 2010 through February 2011 when Beck allegedly counseled Gowen regarding various aspects of her performance. The letter then detailed Gowen's failures to meet performance requirements, in three specific areas: "Failure to Properly Manage Staff," "Failure to Ensure CFSD Policies and Procedures Are Followed," and "Failure to Maintain a Courteous, Productive, Respectful and Otherwise Acceptable Working Relationship With the General Public." In both of the first two specific areas, Beck cited the January 29, 2009 expectations letter as well as specific cases and policies. The letter concluded by providing the standard opportunity for Gowen to respond in writing to the specifications of her failures. Exhibit JT-11.

By an undated letter, apparently sent by email on March 14, 2011, Gowen responded to the March 1, 2011 letter from Beck. Consistent with her previous responses to corrective action at any level, Gowen maintained that she had never done anything wrong and that references to earlier counseling and conduct involved "situations that were resolved a long while ago and immediately upon your request" and that other cited failures to perform involved "issues never mentioned before." She asserted procedural and substantive failures in the prior grievances, in addition to the pending appeal on the 2-day suspension. She asserted that Beck had given her insufficient information to respond to many of the specific instances and that other specifics could not have happened on the dates given. She claimed to have requested the January 29, 2009 expectations letter (without explaining how that could make any difference if she failed to meet the expectations). Once again, Gowen expressed surprise ("I was amazed"), as she had done in previous responses, that her

---

[2] This new argument was taken from a "Discipline Handling Guide" authored by the State Human Resources Division, Department of Administration, and available on the State's web-site. The guide contains a disclaimer that it "is designed to provide assistance to state supervisors and managers in administering disciplinary action," that it "is not state policy or administrative rule," that it "is not binding on any agency," and that it "does not establish practice or set precedent." State of Montana Discipline Handling Guide, July 8, 2008 (the most recent version readily available on-line).

performance was being called deficient. This time, her surprise was tied to how soon after her Step III appeal of the 2-day suspension this due process letter issued, as well as to how (according to her explanations) little substance it had. Exhibit JT-12.

Gowen refused to speak to the third specific area ("Failure to Maintain a Courteous, Productive, Respectful and Otherwise Acceptable Working Relationship With the General Public"), involving her December 16, 2010 email, because the email was not included with the due process letter. In the same paragraph, she then quoted the one sentence from the IT policy regarding reporting "unacceptable use and other security violations," adding that she "reported a possible breach of security to the appropriate authorities." In an apparent further response to the third specific area, Gowen included in a two-paragraph argument that she had always been very adept and successful at furthering good relations with the Tribes.

Gowen concluded her response with almost a full page of complaints about inadequate supervision and lack of support, asserting that Beck "appears to be" trying to "undermine the work of Lake County CFS" and that Beck was preventing Gowen from participating in training. She reiterated her assertion that "[t]he issues you reference are all taken care of or in process of being addressed. . . . . I am meeting the standards. If there is more to do then I need you to provide me with specific tasks and specific outcomes that you expect." Exhibit JT-12.

By letter dated March 15, 2011, DPHHS Human Resource Director Kathy Bramer, acting on behalf of Department Director Anna Whiting Sorrell, notified Gowen of denial of her Step III grievance on her 2-day suspension. Exhibit JT-13. This was the final administrative decision regarding that grievance. In the letter, Bramer cited Gowen's apparent acknowledgment that it was not proper to access a secured report that was not assigned to her. Bramer also noted:

> Over the last two (2) years, 13 other DPHHS employees have been disciplined for breaching confidentiality. In each case, the disciplinary action was a 2-day suspension.

Exhibit JT-13.

Beck gave Gowen more information about the specifics of the March 1, 2011 due process letter and more time to file a further response. On March 31, 2011, Gowen submitted her further response. It pointed out reasons for some of the cited instances in which Beck questioned Gowen's supervisory decision-making. In two of the instances, Gowen's points appeared valid, but this was a small portion of the instances of questionable decisions Beck's due-process letter cited. Exhibit JT-14.

By a letter dated April 11, 2011, Beck notified Gowen that she would be suspended for five days without pay for "your continued failure to meet the

performance requirements of your position." Exhibit JT-15. Beck accurately stated that Gowen's responses to the due process letter "essentially equate to a blanket denial of any wrongdoing." Beck went on to cite several instances in which Gowen had not satisfactorily explained her conduct, and then noted:

> . . . [Y]our responses, as a whole, are extremely troubling. They indicate an apparent lack of recognition on your part of the importance of ensuing [sic – "ensuring" should have been the word] staff are available to timely and properly respond to reports of child abuse/neglect, ensuring that established policy and procedures are complied with, and ensuring you maintain a courteous, productive, respectful and otherwise acceptable working relationship with those with whom you have contact. They also indicate a lack of willingness on your part to take any responsibility for any of the problematic issues identified in the due process letter, even though your primary responsibilities are to ensure staff and the office are properly managed and cases are handled and processed both timely and properly.

Beck followed the above comments with the admonition to Gowen that "[i]f your employment with the department is to continue you must take immediate, proactive steps to improve your performance." Beck followed this admonition with a 20 item (with subparts) list of expectations of Gowen, followed by the warning that if she failed at any time to meet any of the expectations in the list, "further disciplinary action will be implemented, up to and including termination of your employment." Exhibit JT-15.

By a memo to Cory Costello, State Regional Administrator Supervisor, dated April 26, 2011, Gowen submitted a Step II formal grievance of her 5-day suspension. Exhibit JT-16. In her grievance, Gowen first thanked Costello for meeting with her on April 11, 2011 and "discussing the expectations and responsibilities required of me in the Corrective Action letter from Coral Beck."[3] Gowen presented, under Step II, a detailed criticism of Beck's due process letter, including multiple assertions that dates for alleged violations were wrong or missing, that specific instances of alleged failures to follow policy were not each accompanied by citations to specific subsections of specific policies, and that no case numbers were listed. Gowen reiterated at several points that she was not given opportunities to "discuss" or "talk to" anyone about the alleged failures. In addition, Gowen referenced her responses to Beck, and argued that Beck had not talked to other persons involved and had not

[3] Gowen did not mention that Beck also participated in that meeting and discussion.

investigated the alleged failures. Gowen asserted, rather as she had in grieving her 2-day suspension, that the financial consequences of suspension were "punitive and disproportionate to any potential damage that may have occurred by my actions." Exhibit JT-16.

By a letter dated May 3, 2011, Costello denied Gowen's Step II grievance. Exhibit JT-17. The second paragraph of that letter contains its entire substance:

> I have reviewed your grievance and find no basis for overturning the 5-day suspension. I disagree with your assertion that the suspension was based on inaccurate and unsubstantiated information. I also disagree with your suggestion that a 5 day [sic] suspension was overly punitive. The 5-day suspension resulted from very serious deficiencies in your performance, which, as Ms. Beck and I discussed with you on April 11, 2011, must be rectified.

By a memo to Anna White Sorrell, dated May 17, 2011, Gowen submitted her Step III grievance to DPHHS. Exhibit JT-18. She continued her insistence that she was not given a proper opportunity to resolve the disciplinary concerns informally after receipt of the due process letter ("Step I" of her grievance). She also insisted that Costello's denial at Step II was defective because it had not provided evidence that there had been an investigation by Costello of Beck's allegations and determinations. In her Step III grievance, Gowen now asked that the Department Head or her designee conduct a full de novo review of the entirety of "35 pages of allegations, responses and appeal requests."

> My request is that you review each allegation made by Ms. Beck, including any evidence or documentation that she may have. I would request that you independently investigate her assertions, including interviewing me and others that have been involved in the situations she contends occurred and the consequences of those alleged circumstances.
>
> . . . .
>
> I want to be included in and made aware of any investigation and evidence that is provided. Her [Beck's] disciplinary action has been significantly costly for me, financially, personally and professionally. I have not been provided anything but Coral's claims.

Exhibit JT-18.

Gowen concluded her Step III appeal by asserting she had never received a response to her previous Step III appeal. The response to Gowen's previous Step III appeal was Exhibit JT-13, Bramer's March 15, 2011 letter to Gowen, addressed to the same post office box as the other responses mailed to Gowen over the course of these proceedings.

By a letter dated June 16, 2011, DPHHS Human Resource Director Kathy Bramer, acting on behalf of Department Director Anna Whiting Sorrell, notified Gowen of denial of her Step III grievance on her 5-day suspension. Exhibit JT-19. This was the final administrative decision regarding that grievance. The entire substance of the letter, after the introductory paragraph identifying it as the response to Gowen's Step III grievance and the final administrative decision, reads as follows:

> I have reviewed the facts of this case, including the due process letter and your response, and copies of your Step I and II grievance documents. You maintain that the allegations regarding your failure to follow policy and other serious performance deficiencies did not justify your 5-day disciplinary suspension. Your March 14, 2011 response to the due process letter that detailed these issues failed to provide justification or reasonable explanation for your performance failures.
>
> No new information was provided in your letter that would give the Department reason to revoke its prior decision denying your grievance at Step II. Your Step III grievance is therefore denied.
>
> On a separate issue, you allege in your grievance that you did not receive a response to your prior Step III grievance dated February 16, 2011. I have enclosed a copy of that response which was mailed to you on March 15, 2011.

As of Friday, June 17, 2011, all disciplinary proceedings to that point in time were final. On this grievance hearing record, none of the disciplinary proceedings to that point in time lacked just cause. None of Gowen's arguments against those disciplinary proceedings, including the arguments in her grievances, had rebutted the just cause for those disciplinary proceedings. To that point in time, the record does not demonstrate any racial retaliation or any other impropriety that would have justified reducing or removing the disciplines imposed upon her.

C. Decisions Regarding Gowen's Discharge Grievance

Almost ten months later, the series of events resulting in Gowen's discharge began to unfold, as described on pp. 2-5 of this recommendation. Having fully discussed the prior disciplines, and having found they were all for just cause, the

Hearing Officer will now consider Gowen's grievance of her discharge, from the point previously reached on page 5 herein, with some further limited further references to Gowen's conspiracy theory, which has no merit.

DPHHS denied Gowen's Step II grievance by a letter dated June 22, 2012, sighed by Sarah Corbally, Administrator and Acting Program Bureau Chief, CFSD. Exhibit JT-25. Corbally did not address any of the facts of the alleged breach of confidentiality, but only Gowen's allegations of denial of due process and of conspiracy among her supervisor and her superiors at DPHHS to fire her. It would have been more appropriate for the Step II grievance denial letter to also have addressed the facts of the alleged breach of confidentiality. However, given the facts of this case, repeating that step would be an exercise in needlessly cumulative administrative procedure.

The final administrative grievance phase for discharge (Step III) was the Non-Union Grievance Hearing held on September 5-6, 2012.

The facts involved in the alleged breach of confidentiality in late March 2012 are actually fairly straightforward.

Before focusing upon Gowen's specific defense to the discharge offense of breach of confidentiality, there are some other and broader assertions of hers that should be addressed.

The assertion that Gowen alone was being subjected to discipline for failures which were tolerated in other supervisors was one of her themes. It is impossible to address this assertion in detail, because to do so would require that DPHHS disclose, in this Step III Grievance Hearing, and in detail, the specifics of discipline of any other supervisors disciplined for failure adequately to supervise, which appears both irrelevant and outside the proper scope of this proceeding. It is irrelevant here because if a supervisor is failing to perform her duties and continues to fail after counseling and further progressive discipline, "everybody else does the same thing" is not a defense to failure to perform one's job.[4] It is improper here because disclosure of performance evaluations of other supervisors in other offices and what action, if any, followed those evaluations goes far beyond the appropriate scope of a Step III grievance proceeding for an individual employee.[5]

---

[4] To the assertion "I'm being unfairly singled out," DPHHS can easily and properly respond (if Gowen actually were the first supervisor subjected to this kind of discipline), "We have to start somewhere."

[5] Had Gowen established that it was more likely than not that she was being treated unfairly, whether other supervisors did the same things without receiving discipline still wouldn't matter.

The second broader theme of Gowen's grievance was that DPHHS decided to close the Polson office as part of its campaign to get rid of her. Gowen provided no evidence to support this theme, only assertions that the closure was a bad idea and that it hadn't worked out. This particular assertion adds nothing to the case. Without evidence of a breadth that goes far beyond the scope of this proceeding, it is unbelievable that DPHHS would deliberately worsen its ability to protect children by closing an office that needed to stay open, offering all personnel in that office the opportunity to move to another office, and hiring and training new personnel to replace those who chose not to transfer, all to eliminate a single supervisor. Such a scheme would be reprehensible, illegal, and virtually impossible to conceal, given the number of management employees that would have to knowingly participate in it. There are some exhibits pertinent to this office closing issue that are part of the record, but their contents are not useful for this recommendation, because they do not prove any such scheme.

Only one piece of evidence regarding the closure of the Polson office requires further comment. DPHHS did not consult with Gowen about closing the office before the decision was made. She argued omission that proved the closure was part of the conspiracy to end her employment. Grossberg, Gowen's last supervisor and the person who wrote the discharge letter and actively participated in that decision, testified that she did not want to include Gowen in the discussions about the closure, because the result would have been more "circular" discussions that went nowhere. Based upon Gowen's responses to the discipline she received, it was reasonable for management to expect that including Gowen in the discussions would yield blanket opposition to closure of the office, denial that there were any problems with the office's performance, and a blanket refusal to consider the need for any change. Perhaps it would have been a better practice to nonetheless include the on-site supervisor in the discussions and decision-making, but her exclusion under these facts did not evidence any kind of improper, malign motive.

The final broader theme is an allegation that Gowen was unfairly attacked and disciplined, commencing in the March 1, 2011 letter, for only one reason – the "only new" item in the March 1, 2011 letter, her email report of a "security violation."

It is more likely than not that DPHHS was very unhappy with Gowen's email report of December 16, 2010, but the evidence established just cause for that unhappiness. It is remarkable that Gowen characterizes disciplinary action that was at least in part based upon this incident as "racial retaliation." On the face of the facts, Gowen showed extremely poor judgment and put at risk CFSD's working relationship with Flathead Tribal Social Services by gratuitously becoming an active participant in what may have been an internal conflict within that entity that had spilled over into the use of DPHHS's CAPs system. It is unclear how large a role this

incident played in the subsequent 5-day suspension that came out of the disciplinary process that started with the March 1, 2011 "due process" letter. What seems very clear is that Gowen's conduct regarding this incident properly played a part in that discipline because her conduct was entirely inappropriate. The evidence is also clear that she has, to the present, professed complete ignorance about any impropriety or bad judgment shown by her email. She appears still to cling to the belief that the only reason this email has become an issue is because the supervisor that Gowen reported had forged a signature on a document sent to DPHHS's CAPS support technicians belonged to the same tribe as DPHHS's Director. On this record, her belief is not supported by any credible or substantial evidence.

With all the evidence in, and duly considered, it is clear that Gowen's December 16, 2010 email was considered and did contribute to Gowen's 5-day suspension, and there was nothing improper about that suspension or the inclusion of her email as one of the reasons for it.

Having addressed and dismissed these broader assertions, what remain are the grievance arguments applicable to the facts of the alleged breach of confidentiality at the late March 2012 meeting (apparently in a conference room at the Lake County Courthouse) with Chuck Wall and Diane Richard. Those facts are relatively simple, and have been briefly set out at pages 2-3 of this recommendation. They will be repeated in more detail here.

Part of Gowen's job was to work with the participants in the CPS process – the various entities, agencies, and persons who, one way or another, had roles and stakes in the process – to facilitate the closure of the office. Gowen agreed to a meeting sought by Wall, an attorney who had represented children in abuse/neglect cases and who was at the time still representing one such child. Gowen had apparently invited Richard to join the meeting. Beyond cavil, both Wall and Richard were participants and stakeholders in the CPS process. Richard was recently again a participating member of a Child Protection Team (CPT) that met regularly in the Polson office (she had attended those meetings in the past). Wall could have been a member, but apparently had rarely, if ever, participated in the process, and more likely than not was not a CPT member per se.

Gowen prepared printouts of computer screens and reports to use during the meeting. Many of those printouts contained confidential information about abuse/neglect reports or investigations. Such confidential information could properly be shared during CPT meetings, and often had been shared during CPT meetings in the Polson office (and perhaps at other locations), with papers distributed and then collected again at the end of the meeting, and perhaps computer screens of reports being projected for the participants to see.

Wall was concerned about how CFSD would serve the Lake County community and particularly at risk children (such as those he had represented) without a local presence. Gowen's testimony about the meeting focused upon her role in persuading the participants and stakeholders (in this case Wall and Richard) that the system could and would work with the office closed. However, the evidence adduced also established that more likely than not she was also trying to show these two participants and stakeholders that although the system could and would work with the office closed, the case numbers did not support closing the office.

In furtherance of her goals for the meeting, Gowen took the printouts to the meeting. As some point, Gowen suggested or declared that the meeting be treated as a CPT meeting, and the others agreed. According to her testimony, Gowen had in the past used "we're treating this as a CPT meeting" when she had confidential information that she felt it necessary to share with outsiders with whom she was meeting, and who otherwise would not be entitled to the information outside of a CPT meeting. The Hearing Officer has mixed feelings about that testimony. If it is true, then Gowen appears to have expanded the CPT exception to confidentiality far beyond its intended purpose. If it is not true, Gowen's credibility is damaged. For purposes of this recommendation, the Hearing Officer will take the testimony as true. The recommendation herein would be the same if Gowen's testimony about her broad use of "we're treating this as a CPT meeting" was untrue.

Having converted the meeting, by fiat, to a "CPT meeting," Gowen used the printouts and disclosed the information. In the printouts, Richard saw the name of a current or former CASA representative she had supervised. Gowen became aware that Richard might be uncomfortable with what she was seeing, and reassured Richard that it was okay. There is no evidence that Wall or Richard kept any of the documents that Gowen brought to the meeting with them after the meeting.

In support of her assertion that because she had declared the meeting a CPT meeting there was no breach of confidentiality, Gowen presented evidence that established that more likely than not, similar disclosures had been made in regular CPT meetings, sometimes at the direction of or with the approval of the current Region V Administrator, Grossberg, who was at such meetings. DPHHS presented some evidence of efforts to avoid any disclosure of report or investigation contents that involved persons related, by family, employment or otherwise, to any attending CPT members, and some evidence that it was trying to be more careful about disclosures in CPT meetings. On the entire record, it is more likely than not that the only significant difference between the disclosures made in regularly scheduled CPT meetings and the disclosures made by Gowen in the meeting with Wall and Richard was that disclosures in the meeting with Wall and Richard were not made to assess

the needs of, formulate and monitor a treatment plan for, or coordinate services to one or more specific children and children's families. Mont. Code Ann. § 41-3-108.

This difference is extremely significant. Although Corbally should have discussed it in her denial of Gowen's Step II grievance, that oversight does not change the validity of the outcome.

The evidence is clear on this record that confidential information can be disclosed for CPT members to see during a CPT meeting, although they cannot take copies of it with them. Outside of a CPT meeting, showing such confidential information to CPT members who have no other right to access it is a breach of confidentiality, whether or not they could see or even have seen that information in CPT meetings.

Taking Gowen's testimony as true, she used a "CPT meeting zone" that she believed she could create by announcing "we'll call this a CPT meeting" at any gathering with one or more stakeholders who might qualify to attend scheduled CPT meetings at the Polson office, whether they currently were invitees or not for those meetings. If she was at such a gathering and wanted to disclose confidential information, she obtained agreement from the attendees to "call it a CPT meeting" and then made the disclosures. Gowen defended this practice as appropriate since she had been using it for some time and no one had complained or directed her to stop. She defended this practice as one she had never been trained not to use. She defended it because, but for the ad hoc "CPT meeting zone" method of invoking the CPT exception to confidentiality constraints, she had done nothing different from current CPT meeting practice at the Lake County office.

Unfortunately for Gowen's grievance, the purpose of her meeting with Wall and Richard was not to have a CPT meeting. She was supposed to be persuading Lake County participants and stakeholders that CFSD could and would protect children in the county with the local office closed. That is not within the statutory purposes for which a CPT meeting can occur under Mont. Code Ann. § 41-3-108, so the meeting was not a CPT meeting. In reality, Gowen was trying to persuade the two stakeholders that CFSD could and would protect children in the county with the local office closed, but that there was no real need to close the local office. With those mixed purposes, the meeting emphatically was not a CPT meeting.

Thus, Gowen's description of the lack of significant differences between the disclosures at a CPT meeting and the disclosures she made at what she called a CPT meeting with Wall and Richard was accurate, but irrelevant. She did not have the authority to create a "CPT meeting zone" to disclose confidential information outside of actual CPT meetings, at a meeting for a purpose outside of the scope of the

purposes for a CPT meeting. She should never have begun a practice of creating such zones.

Of even greater weight are the facts involving Gowen's prior discipline. She had been disciplined for a breach of confidentiality by accessing a secure report without authorization. She had been specifically warned about the importance of confidentiality, and she reasonably should have known that for breach of confidentiality a "no harm, no foul" defense would not apply. In late March 2011, Gowen absolutely knew the risks to her employment of engaging in any doubtful disclosures that could breach confidentiality.

Perhaps because she continued to believe, in the face of rather substantial evidence, that she had never done anything wrong, Gowen was not trying to change any of her work behavior or habits. She had been told that if her employment with the Department was to continue, she had to take immediate, proactive steps to improve her performance. She rejected the statement entirely, and took no steps to change her performance and protect her career.

Had she not been the subject of the prior disciplinary proceedings, had this final failure to meet expectations instead been her first such failure, this breach of confidentiality probably would not have resulted in her discharge, under DPHHS progressive disciplinary policy. However, with the history of disciplinary actions in her file, this breach did justify her discharge.

2. Recommendation

An employee challenging a disciplinary action has the burden to establish by a preponderance of the evidence that he was aggrieved in a matter of his employment. Mont. Code Ann. § 2-18-1012. Disciplinary action against a state employee must be administered for just cause. Admin. R. Mont. 2.21.6506. Providing due process to an employee in a discharge proceeding requires the employer to ensure (1) that the employee is made aware of the action being taken and the reason for it; and (2) that the employee has an opportunity to respond to and question the action and to defend or explain the questioned behavior or actions. Admin. R. Mont. 2.21.6509. *C.B.E. v. Loudermill*, 470 U.S. 532, 544 (1985); *Wolny v. City of Bozeman*, ¶18, 2001 MT 66, 306 Mont. 137, 30 P.3d 1085; *Boreen v. Christensen*, 267 Mont. 405, 884 P.2d 761, 770 (1994).

Gowen received the requisite notices for each disciplinary action taken against her, including her discharge. For each disciplinary action, including her discharge, she was given opportunities to respond, to question the action, and to defend or explain the questioned behavior and actions. She was accorded clarifications of the matters at issue and allowed second responses in some instances. Therefore, Gowen's

Step III grievance regarding her discharge from employment should be denied. The kind of "due process" that she, and later she and her attorney, asserted should apply here could be suitable for civil litigation, but is definitely more process than is due in an internal grievance hearing between a former employer and a discharged employee.

3. Notice of Governing Rule

Pursuant to Admin. R. Mont. 2.21.8018(9), the Department Head shall issue the final administrative decision within 10 working days of receipt of this hearing summary and recommendation.

DATED this 27th day of September, 2012.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

By: /s/ TERRY SPEAR
TERRY SPEAR
Hearing Officer